United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 17, 2005

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SecureTrans, LLC 512-5084-5050
Case 19-CA-29405 512-7500
518-4040-5000
International Union, Security, 518-8000
Police & Fire Professionals 536-2563
of America (SecureTrans, LLC) 596-0420-5000
Case 19-CB-9163 596-0420-5050
596-0420-5500

The Region submitted these Section 8(a)(2) and Section 8(b)(1)(A) and (2) cases for advice as to whether the allegations that the Employer prematurely extended recognition covering its operations at two port terminals are time-barred under Section 10(b).

We conclude that these charge allegations are untimely, as the Charging Party had knowledge of, or should have known of, the recognition outside the Section 10(b) period. Accordingly, they should be dismissed, absent withdrawal.

FACTS

SecureTrans (the Employer) provides contract security services at various Port of Seattle terminals. Thus, the Employer provides year-round, 24-hour a day security services at Port of Seattle Terminal 18 (Terminal 18) pursuant to a contract with Stevedoring Services of America (SSA).

In December 2003, the International Union, Security, Police & Fire Professionals of America (SPFPA or the Union) sought to organize the Employer's Terminal 18 employees. In this regard, on January 2, 2004[1] the Employer and SPFPA executed a Neutrality and Card Check Agreement (the Neutrality Agreement), which expired by its terms on January 2, 2005. The Neutrality Agreement provided, *inter alia*, that the Employer would notify the Union within 15 days of hiring a representative employee complement at any new location; thereafter grant the Union reasonable access to those employees for 30 days and remain neutral while the Union attempted to organize them; furnish the Union with

[1] All dates are 2004 unless otherwise indicated.

those employees' job titles, home addresses, and telephone numbers; and honor the results of any Union card check conducted by a neutral arbitrator.

A January 3 card check revealed that a majority of the Employer's approximately 20 Terminal 18 gate security and bus driver security officers had authorized the Union to represent them, and SPFPA and the Employer executed a contract that day. The contract, effective by its terms from January 3, 2004 through January 3, 2007, expressly incorporates the provisions of the parties' Neutrality Agreement.

On approximately February 25, the Employer executed a Service Agreement with Cruise Terminals of America (CTA), effective from March 1 until November 1, to provide part-time, seasonal security and passenger screening services at Port of Seattle Terminals 30 and 66 (Terminals 30 and 66) during the 2004 Alaska cruise season.[2] In late March, the Employer hired roughly 65 employees to perform this work, including Charging Party William Hunter, whom the Employer hired as a Terminal 30 security officer on March 26.[3] Hunter stated that while completing his new-hire paperwork that day, the Employer informed him that he would be required to join the Union as a condition of employment and to complete a Union dues authorization form, which he did.[4] Hunter understood that the Employer had not worked for CTA at Terminals 30 and 66 prior to the 2004 Alaska cruise season, and also that CTA's previous security contractor, Olympic Security, was not unionized.

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[2] CTA manages Terminals 30 and 66, which handle Alaska cruise ships that operate between April and October. CTA hired the Employer to provide security and passenger screening services at these terminals on Fridays, Saturdays, and Sundays during the 2004 Alaska cruise season.

[3] Hunter later worked as a checkpoint supervisor until he was terminated on August 15, assertedly for "insubordination and airing gripes and grievances with [the Employer's] clients." As set forth below, on September 2 Hunter filed an unfair labor practice charge challenging the grounds for his termination.

[4] The Union dues authorization form Hunter executed provides that it "shall be irrevocable for the period of one (1) year from [execution] or until the termination of the [contract] between the Employer and the Union which is in force at the time of delivery of this authorization, whichever occurs sooner...."

> On April 2 the Employer wrote the Union that,
>
> We have signed a contract with [CTA] to provide [U]nion security officers at Port of Seattle Terminals 30 and 66. This is a seasonal account that runs approximately April 15, 2004-October 15, 2004.
>
> Wages are higher than the Puget Sound area contract that you are preparing to submit to me for signature. We have previously agreed that no fringe benefits will be offered to these officers, because of the seasonal nature of the work.[5]
>
> On this basis, we agree to recognize the SPFPA as the union for the officers assigned to the CTA account this summer.

Neither party contends that the Union ever possessed or offered to demonstrate evidence of majority support from the Terminal 30 and 66 employees.

In early April, before the end of the pay period ending April 16, Terminal 30 and 66 employees, including Hunter, attended training sessions for which they were paid. The Employer first performed security and passenger screening services for CTA at Terminal 66 on April 21, and at Terminal 30 on May 1.

In early October, the Employer laid off the majority of its Terminal 30 and 66 workforce, since the 2004 Alaska cruise season was winding down. However, the Employer retained approximately 25 Terminal 30 and 66 employees to work at Terminal 18 on a part-time or on-call basis.

The Employer does not currently provide any services for CTA at Terminals 30 and 66. Should CTA renew its contract with the Employer for the 2005 Alaska cruise season, Employer operations would resume at Terminals 30 and 66 in late April or early May 2005.

On August 9, Hunter filed a Section 8(b)(1)(A) charge in Case 19-CB-9163 alleging that the Union's refusal to

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[5] The Terminal 18 contract sets hourly wage rates at $9.80 for gate security officers and $10.16 for bus driver security officers, and provides that the parties will negotiate health insurance and 401(k) benefits. The Employer and Union agreed that the Terminal 30 and 66 seasonal employees would be paid between $11.25 and $12 per hour, but would not be eligible for the fringe benefits contemplated in the Terminal 18 contract.

return telephone calls or process grievances constituted a breach of its duty of fair representation. On September 2, Hunter filed a Section 8(a)(3) and (4) charge in Case 19-CA-29405 alleging that his August 15 discharge was unlawful because it occurred (i) after he informed his supervisor that he wanted to become a shop steward, and (ii) after the Employer received a copy of his charge in Case 19-CB-9163. On October 14, Hunter amended both charges to include allegations that, before the Union represented an uncoerced majority of Terminal 30 employees, it sought recognition in violation of Section 8(b)(1)(A) and (2), which the Employer granted in violation of Section 8(a)(2).[6]

ACTION

We conclude that the instant premature recognition charges are time-barred because the Employer recognized the Union outside the Act's six-month limitation period; Hunter had sufficiently clear notice of this fact more than six months before he alleged the subject unfair labor practices; and these charge allegations do not relate back to his original timely-filed charges. Accordingly, the Region should dismiss Hunter's Section 8(a)(2) and Section 8(b)(1)(A) and (2) charges, absent withdrawal.[7]

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[6] Hunter's October 14 amendment in Case 19-CB-9163 also alleged that the Union violated Section 8(b)(2) by agreeing to and enforcing a Union security clause. On November 30, Hunter amended this charge again, alleging that the substance of his October 14 amendment applied to the Terminal 66 workforce as well.

Hunter's October 14 amendment in Case 19-CA-29405 also alleged that the Employer otherwise violated Section 8(a)(1) and (3). On November 30, Hunter amended this charge again, alleging that the Section 8(a)(2) and (3) allegations in his October 14 amendments also affected the Terminal 66 employees.

The Region has made no-merit determinations on all of Hunter's charge allegations except for the Section 8(a)(2) and Section 8(b)(1)(A) and (2) unlawful recognition charges submitted for advice.

[7] In light of this determination, we need not address the Union's argument that the Terminal 30 and 66 employees constituted an accretion to the Terminal 18 unit. We note, however, that the Board will not accrete a larger number of unrepresented employees into a smaller existing unit without giving them a chance to express their representational desires. See Carr-Gottstein Foods Co., Inc., 307 NLRB 1318, 1318 (1992).

Initially, we conclude that the Employer had recognized the Union by April 2. Thus, it is well settled that an employer can recognize a union by virtue of bargaining with it.[8] Here, the Employer's April 2 letter confirms that the Employer had, prior to that date, negotiated with the Union over terms and conditions of employment for the Terminal 30 and 66 employees.[9] Thus, the letter states, in relevant part, that,

> [w]ages are higher than the Puget Sound area contract that you are preparing to submit to me for signature. We have previously agreed that no fringe benefits will be offered to these officers, because of the seasonal nature of the work. (Emphasis supplied.)

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board...." In this regard, the Supreme Court in Bryan Manufacturing[10] held that Section 10(b) barred unfair labor practice charges filed 10 and 12 months after the employer executed a contract, containing a union security clause, with a minority union. The Court rejected the Board's contention that, although a challenge to the contract's unlawful execution was time-barred, the parties' continued

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[8] See International Union of Operating Engineers Local 150 v. NLRB, 361 F.3d 395, 400 (7th Cir. 2004), enfg. 339 NLRB 221 (2003), citing Lyon & Ryan Ford, 246 NLRB 1, 4 (1979), enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981).

[9] We therefore would not find that the Employer only conditionally recognized the Union on April 2 because its seasonal contract with CTA, set to run from approximately April 15 until October 15, had not yet taken effect. Rather, the Employer effectively recognized the Union once it bargained for terms and conditions of employment applicable to its Terminal 30 and 66 workforce. See generally Majestic Weaving Co., 147 NLRB 859, 860 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966) (employer violated Section 8(a)(2) by negotiating contract before union represented a consenting majority of unit employees; Board found it "immaterial" that employer conditioned signing the contract on union having obtained majority employee support at conclusion of negotiations).

[10] Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411 (1960).

enforcement of the union security provision within Section 10(b)'s limitation period established a violation.[11] Thus, the Court noted that the vice in enforcement of the parties' contract was "manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered."[12] Since Hunter filed his premature recognition allegations on October 14, the attendant Section 10(b) limitation period is April 14. As set forth below, because we find that Hunter had sufficiently clear notice prior to April 14 that the Employer had prematurely recognized the Union, we conclude that these charge allegations are time-barred under Bryan Manufacturing.

The Board has long held that Section 10(b)'s limitation period does not begin to run until the affected party is on actual or constructive notice of the material events giving rise to a charge.[13] Thus, the Board has found Section 10(b)'s limitation period tolled where the affected party had no knowledge of the events giving rise to an unfair labor practice.[14] In R.J.E. Leasing, although the charge attacking the respondents' July 1979 prehire contract was not filed until March 30, 1980, the ALJ found that employees were unaware of the contract until January 1980 -- within the Section 10(b) period -- when it was applied to them.[15]

However, the Board recently underscored that Section 10(b)'s limitation period begins to run when a party "first has 'knowledge of the facts necessary to support a ripe unfair labor practice.'"[16] Additionally, the Board has explained that Bryan Manufacturing and the Act's legislative history require "strict adherence" to the Section 10(b)

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[11] Id. at 415, 422.

[12] Id. at 423.

[13] See, e.g., Crown Cork & Seal Co., Inc., 255 NLRB 14, 22 (1981), enfd. 691 F.2d 506 (9th Cir. 1982) (Table).

[14] See, e.g., R.J.E. Leasing Corp., 262 NLRB 373 (1982).

[15] Id. at 381-382. In fact, no employees were hired until December 1979, the same month that operations at the facility in issue commenced. Id. at 375, 377.

[16] St. Barnabas Medical Center, 343 NLRB No. 119, slip op. at 3 (2004), quoting Leach Corp., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995) (emphasis original).

limitation period,[17] and that an affected party need not have knowledge of all the circumstances leading up to or surrounding the event in issue for the limitation period to commence.[18]

For example, the Board in Safety-Kleen[19] found that the Section 10(b) period on a Section 8(a)(3) discharge began to run on the date the employee was discharged because at that time he had sufficient knowledge that the Employer harbored animus toward the Union and that the timing of his discharge undercut the assertedly legitimate reason proffered by the Employer. The charging party there had mentioned unions in two brief conversations with co-workers, once during his first or second week on the job (at which time a co-worker admonished him not to do so), and again roughly six months later.[20] He did not suggest employees contact any particular union, initiate an organizing campaign, or circulate authorization cards; nor did he discuss unions with supervisors or, to his knowledge, engage in any activity that labeled him as pro-union in management's eyes.[21] When he was fired one week after attending a training seminar, assertedly for missing his sales quotas, he thought the timing was odd, coming before he could implement what he had just learned, but he did not question the reason since his sales quotas were consistently low.[22] On this record, the Board held that the charging party was on notice of facts sufficient to warrant requiring him to file his unfair labor practice charge within six months of his

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[17] See, e.g., Allied Production Workers Union Local 12 (Northern Engraving Corp.), 331 NLRB 1, 2 (2000), upheld on reconsideration 337 NLRB 16 (2001).

[18] Amalgamated Industrial & Service Workers Local 6 (X-L-Plastics), 324 NLRB 647, 647 n.2 (1997), enfd. 172 F.3d 41 (3d Cir. 1998) (Table), quoting R.P.C., Inc., 311 NLRB 232, 235 (1993).

[19] Safety-Kleen Corp., 279 NLRB 1117 (1986).

[20] Id. at 1118.

[21] Ibid.

[22] Id. at 1119. The charging party ultimately learned from his former supervisor that he was fired for perceived union activity, and three and a half months later -- more than 10 months after his discharge -- filed his Section 8(a)(3) charge. Id. at 1119.

discharge to escape Section 10(b)'s bar.[23] The Board stated that,

> [The charging party] knew he had discussed unions with other employees twice during his tenure...., that according to one employee, he •should not mention unions• around the [employer's] premises, and, finally, that his discharge for not making sales quotas was oddly timed -- coming right after he had completed a training seminar to improve his performance and before he had an opportunity to prove what he could with that training.[24]

Thus, the Board required the employee to connect some rather unapparent dots to avoid his charge being barred by Section 10(b).

Applying the foregoing principles, we conclude that, unlike R.J.E. Leasing, there is no basis for tolling the Section 10(b) limitation period here. Thus, Hunter first learned of the facts necessary to support ripe Section 8(a)(2) and Section 8(b)(1)(A) and (2) premature recognition charges when he was hired as a Terminal 30 security officer on March 26 and, accordingly, the Section 10(b) period commenced on that date. While completing his new-hire paperwork that day, the Employer told him that he would be required to join the Union as a condition of employment and, at that time, he completed a Union dues authorization form providing that it would be "irrevocable for the period of one (1) year from [execution] or until the termination of the [contract] between the Employer and the Union which is in force at the time of delivery of this authorization, whichever occurs sooner...." Further, Hunter understood that, prior to the 2004 Alaska cruise season, CTA had not utilized the Employer's services at Terminals 30 and 66 -- i.e., he knew or should have known that the Employer hired him to staff a new operation at Terminals 30 and 66, rather than to fill a vacancy due to routine employee turnover at an existing Employer account where a collective-bargaining relationship may have already been in existence.[25] Moreover, Hunter knew that the previous contractor was not unionized. In all these circumstances, we conclude that, as

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[23] Id. at 1117 n.1.

[24] Ibid.

[25] In this regard, we note that Terminal 30 and 66 employees attended training sessions prior to April 16 at which Hunter could have learned that none of his co-workers had validly selected the Union either.

in Safety Kleen, Hunter had notice of facts sufficient to warrant requiring him to file his Section 8(a)(2) and Section 8(b)(1)(A) and (2) premature recognition charges within six months of his March 26 hire date, even if he was unaware of all of the circumstances surrounding the formation of the parties' collective-bargaining relationship. Therefore, we conclude that these charge allegations are untimely.

Next, we would not interpret the Court's statement in Bryan Manufacturing that Section 10(b) would not bar a complaint attacking "an agreement...validly executed, but unlawfully administered"[26] to toll the limitation period here. We read the Court's language as explaining that Section 10(b) would provide no defense to a charge alleging independently discriminatory or otherwise unlawful application of a facially valid clause. For example, Section 10(b) would not bar a charge alleging a union unlawfully administered an otherwise lawful exclusive hiring hall provision,[27] where the provision was contained in a contract executed more than six months before the charge was filed. Here, however, there is no allegation that the conduct engaged in during the Section 10(b) period was unlawful independent of the validity of the recognition. Accordingly, we find that the instant case does not fall within this rubric, and the Court's reasoning is inapplicable here.

Finally, we conclude that Hunter's Section 8(a)(2) and Section 8(b)(1)(A) and (2) charge allegations do not relate back to his original timely-filed charges. In Ross Stores,[28] the Board stated that its test for determining

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[26] Bryan Manufacturing, 362 U.S. at 423.

[27] See, e.g., Teamsters Local 186 (Associated General Contractors), 313 NLRB 1232 (1994) (union unlawfully registered business agent/dispatcher at the top of out-of-work-list it maintained pursuant to its contractual exclusive hiring hall referral system, and referred him to a job by virtue of that placement following termination of his employment as a union business agent/dispatcher).

[28] Ross Stores, Inc., 329 NLRB 573, 573 n.6 (1999), enf. granted in part and denied in part 235 F.3d 669 (D.C. Cir. 2001)(court enforced Board's unlawful discharge finding, and approved of Board's "closely related" test concerning timely and untimely charge allegations, but found the untimely charge based on a "no solicitation" warning was not closely related to the timely charge alleging the unlawful discharge).

whether later complaint allegations are closely related to unfair labor practice charges[29] applies when analyzing whether otherwise time-barred allegations in an amended charge relate back to allegations of an earlier timely-filed charge. The Board considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge; whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge; and whether a respondent would raise similar defenses to the allegations.[30] Applying this test, we conclude that neither of the instant unlawful premature recognition charge allegations relates back to Hunter's original charges. Thus, the untimely premature recognition charges involve different legal theories, arise from different factual situations, and would be defended on different grounds than Hunter's timely-filed duty of fair representation and discharge allegations.

For the foregoing reasons, we conclude that the instant Section 8(a)(2) and Section 8(b)(1)(A) and (2) charge allegations are time-barred under Section 10(b). The Region should therefore dismiss these allegations, absent withdrawal.

B.J.K.

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[29] See, e.g., Redd-I, Inc., 290 NLRB 1115, 1118 (1988) and Nickles Bakery of Indiana, 296 NLRB 927, 928 (1989).

[30] Ross Stores, 329 NLRB at 573.